Filed 2/5/19 In re J.G. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re J.G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.G., Defendant and Appellant.	G055029 (Super. Ct. No. 17DL0794) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Joanne Motoike, Judge. Affirmed and remanded with instructions.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

J.G. appeals from the judgment declaring him to be a ward of the court and sentencing him to probation. He contends only that the condition of probation requiring that he "[c]omplete any program of counseling if directed" by probation is unconstitutionally vague and overbroad because it improperly delegates judicial authority over the condition to the probation department.

We agree, and remand the case to the trial court with instructions to either strike the condition or modify it to more specifically declare what, if any, counseling J.G. is required to complete.

FACTS

In May 2017, a police officer noticed J.G., then age 15, sitting on the staircase of an apartment building in territory claimed by the Delhi gang, with a known Delhi member who was on probation. J.G. was wearing a Detroit Tigers hat with the letter "D" in the front, which the officer concluded was intended to convey an affiliation with the Delhi gang.

When the officer got out of his vehicle, J.G. and his companion turned and started walking up the stairs, and J.G. was grasping the waistband of his pants in a manner the officer thought suspicious. The officer instructed J.G. and his companion to stop; he then asked if either of them had a gun. J.G. admitted he was carrying a pistol near his ankle.

The Orange County District Attorney filed a petition charging J.G. with five crimes: carrying a concealed loaded and unregistered firearm (Pen. Code, § 25400,

subds. (a)(2) & (c)(6); count 1); possession of a firearm by a minor (Pen. Code, § 29610; count 2); carrying a loaded unregistered firearm in public (Pen. Code, § 25850, subds. (a) & (c)(6); count 3); carrying a loaded stolen firearm in public (Pen. Code, § 25850, subds. (a) & (c)(2); count 4); and street terrorism (Pen. Code, § 186.22, subd. (a); count 5). With respect to counts 1 through 4, the petition also alleged a criminal street gang enhancement (Pen. Code, § 186.22, subd. (b)(l)).

J.G. admitted to all the counts as charged, including the enhancements. The trial court sentenced him to probation subject to various terms and conditions, including a requirement that he "[c]omplete any program of counseling if directed. Parents ordered to attend counseling with minor, if requested."

DISCUSSION

J.G.'s sole contention on appeal is that the probation condition requiring him to complete "any program of counseling if directed" by probation must be stricken because (1) it represents an improper delegation of judicial authority to the probation department, and (2) it is unconstitutionally vague.

The Attorney General counters that J.G. has waived his objection to the probation condition by not raising the point in the trial court. We cannot agree because, as explained by our Supreme Court in *In re Sheena* K. (2007) 40 Cal.4th 875, 889 (*Sheena K.*), the claim that a probation condition is unconstitutionally overbroad on its face is not forfeited by the failure to assert it below.

The Attorney General acknowledges *Sheena K.* but argues it does not apply here because J.G.'s contention does not present a pure question of law. Specifically, the Attorney General claims that because J.G.'s "central claim is that the condition fails because it does not include necessary limitations on the type of counseling in which [he] can be ordered to participate. . . . this court cannot modify the condition appropriately without examining the record (to see which type of counseling would be appropriate) or

remanding to the trial court." That assertion is flawed for two reasons. First, it confuses the issue of whether the condition at issue is overbroad on its face with the issue of what more specific condition might be acceptable. And second, it ignores the fact that neither remanding the case to the trial court, nor striking the term outright—both of which are possible remedies—would require this court to engage in any examination of the factual record.

The Attorney General also relies on *In re R.S.* (2017) 11 Cal.App.5th 239, review granted July 26, 2017, S242387 (*R.S.*), for the proposition that a claim of overbreadth can be waived if an attempt to clarify the probation condition might have been effective in the trial court. However, what the court in *R.S.* concluded was that the challenge in that case was forfeited because the overbreadth claim was tied to the specific facts of the offense: "As R.S. himself points out, to evaluate his overbreadth claim, we need to consider his subject crime. Such an analysis does not present a pure question of law, but, instead, requires a consideration of the record." (*Id.* at p. 247.)

In contrast to *R.S.*, J.G.'s argument here asserts an abstract flaw—his contention is that a probation condition which delegates unfettered discretion to the probation department to decide what type of counseling a probationer must undergo, without any direction or limitation from the court, would constitute an impermissible delegation of judicial authority in any case, not just this one. Because the only issue before us is whether the challenged condition is overly broad on its face, we are bound by *Sheena K.* We thus consider the facial challenge to the condition on its merits.

"The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents." (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.) Hence, '"a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court."' (*Sheena K.*, *supra*, 40 Cal.4th at p. 889.) Even though "a minor's constitutional rights are more circumscribed" (*In re Antonio R.*, *supra*, 78 Cal.App.4th at p. 941), "[a] probation

condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K., supra,* 40 Cal.4th at p. 890.)

In this case, J.G. is not asserting the condition is overbroad because it unreasonably infringes on a specific constitutionally protected right, such as freedom of speech or association. Instead, his contention is that a provision requiring him to complete "any program of counseling if directed [by probation]" is overbroad because it fails to specify or limit in any way what sort of counseling might be appropriate for him. This, he argues, amounts to an improper delegation of the court's own authority to decide what, if any, type of counseling he should be required to participate in. We agree.

Probation is a privilege, not a right. (*People v. Olguin* (2008) 45 Cal.4th 375, 384.) Trial courts generally have broad discretion to create and impose terms of probation to promote public safety and the rehabilitation of the probationer. (Section 1203.1; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.)

However, the broad discretion conferred on trial courts by section 1203.1 to formulate terms and conditions of probation "is not boundless; the authority is wholly statutory, and the statute furnishes and limits the measure of authority which the court may exercise." (*People v. Cervantes* (1984) 154 Cal.App.3d 353, 356. "[N]o statutory provision sanction[s] a delegation of unlimited discretion to a probation officer" to implement or interpret probationary terms. "[T]hese determinations are essentially judicial functions." *(Id.* at p. 358.)

A term of probation '"'"must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated."'"' (*People v. Barajas* (2011) 198 Cal.App.4th 748, 753 citing *Sheena K., supra* at p. 890.)

"If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens."'" (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355 (*O'Neil*).) Nonetheless, a probation condition must not be unconstitutionally overbroad. "A restriction is unconstitutionally overbroad . . . if it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.'" (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

If a probationer initially accepts a term of probation that may be constitutionally overbroad, he may later challenge that term on appeal or via habeas corpus. (*In re Bushman* (1970) 1 Cal.3d. 767, 776.)

As explained in *In re Shawna M.* (1993) 19 Cal.App.4th 1686, 1690, "'[t]he judicial power in this state is vested in the courts'" and it is the judiciary's function to """""'declare the law and define the rights of the parties under it." . . . and "to make binding orders or judgments."""""" Although the court "can properly delegate . . . 'the ministerial tasks of overseeing the right as defined by the court,'" it cannot delegate the authority to determine the very scope of that right. (*Ibid.*)[1]

In *O'Neil*, *supra*, the court disapproved a probation condition that prohibited the probationer from associating with any persons designated by his probation officer. As the appellate court explained, the problem was that the lower court "did not in any way define the class of persons who could be so designated." *(Id.* at p. 1358.) While

[1] Cases such as *People v. Stapleton* (2017) 9 Cal.App.5th 989 and *People v. Arevalo* (2018) 19 Cal.App.5th 652 are distinguishable in that both of those cases involved facial challenges to probation terms which required a probationer to obtain approval of any proposed residence without any explanation by the court as to why such a term was appropriate in that particular case. Here, in contrast, the contested term is broader, requiring the probationer to "complete any program of counseling" without explanation or limitation.

the appellate court acknowledged "[t]here are many understandable considerations of efficiency and practicality that make it reasonable to leave to the probation department the amplification and refinement of a[n] order . . . , the court's order cannot be entirely open-ended. It is for the court to determine the nature of the prohibition placed on a defendant as a condition of probation, and the class of people with whom the defendant is directed to have no association." (*Id.* at pp. 1358-1359; see also *People v. Cervantes* (1984) 154 Cal.App.3d 353, 357 ["[Penal Code s]ection 1203.1 . . . grant[s] the discretion to determine the terms and conditions of probation to the court, not to the probation officer"].)

The Attorney General effectively concedes that point, agreeing that while "conditions concerning participation in court-ordered programs may leave program selection and scheduling to the probation officer's discretion" (citing *People v. Penoli* (1996) 46 Cal.App.4th 298, 308), "conditions worded so that the probation officer has 'unfettered' discretion will usually be stricken or found unconstitutional."

In this case, the Attorney General admits the counseling condition "does not specify what type of counseling programs the probation officer can order [J.G.] to participate in and, thus, appears to convey unfettered discretion upon the probation officer that courts have found to be improper."

Having conceded that the probation condition requiring J.G. to "[c]omplete any program of counseling if directed" is overbroad on its face, the Attorney General suggests that this court should modify the condition based on our own review of the record and our own sense of what specific types of counseling would benefit J.G. We decline that suggestion because the judicial discretion to be exercised on this issue is properly vested in the trial court, not us.

DISPOSITION

The judgment is affirmed, and the case is remanded to the trial court for the limited purpose of reconsidering the challenged probation condition. The court is directed to either (1) strike the condition requiring J.G. to "[c]omplete any program of counseling if directed," or (2) tailor that condition to specify whether J.G. is required to complete counseling, and if so, what type of counseling J.G. is required to complete.

GOETHALS, J.

WE CONCUR:

FYBEL, ACTING P. J.

IKOLA, J.